

11. REGISTERED AND UNREGISTERED LAND

1-017 All of England and Wales is now subject to compulsory registration of title. The types of transaction requiring registration were greatly extended by the Land Registration Act 1997, and further by the Land Registration Act 2002, s.4 and Land Registration Act 2002 (Amendment) Order 2008. As transfers for valuable or other consideration, by way of gift, pursuant to a Court Order or on the appointment of new trustees of land, are subject to first registration there will be very few instances where a declaration of trust of newly acquired property will concern unregistered land. In addition, the definition of "gift" now specifically includes a transfer to trustees on trusts other than a bare trust for the settlor (see Land Registration Act 2002, s.4(7)). However, a number of unregistered titles remain and there will still be situations where parties wish to define their interests in unregistered land by way of declaration of trust. Both types of land have therefore been considered in all of the precedents for consistency except where otherwise stated.

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Property purchased as tenants in common

1. INTRODUCTION

There are many reasons why real property purchased jointly should be held by the purchasers as tenants in common and why the respective shares should be defined by a declaration of trust. **2-001**

(a) Interest of a person entitled to a share of sale proceeds

A declaration of trust should make it clear as to the respective interests of the co-owners so that in the event of a split of cohabitants or partners, the division of the proceeds of sale is beyond dispute. It will be appreciated that very often a property is purchased in the names of two persons and whilst they may hold it for themselves as tenants in common (for instance cohabitants or two sisters), in some circumstances they may hold it for several people (for instance six partners in a doctor's practice).

Where the property is a matrimonial asset or owned by civil partners other factors come into play, although the declaration may be useful evidence as to who provided the purchase monies in the first place.

(b) Devolution on death

The share of a deceased co-owner will devolve in accordance with his will or on intestacy or in accordance with the terms of the declaration of trust. **2-002**

(c) Inheritance Tax

The declaration of trust provides evidence as to the shares of the owners of the property.

(d) Insolvency

In the event of the insolvency of one of the owners, the declaration provides evidence as to what percentage of the proceeds of sale belongs to the bankrupt's estate.

(e) Income Tax

2-003 It is useful to define the shares so that any rental income can be returned accordingly. It is generally assumed by HMRC that income from property held jointly by spouses, or civil partners living together (other than property comprising the commercial letting of furnished holiday accommodation or shares in a close company) should be split 50/50 (Income Tax Act 2007, s.836). A declaration of trust provides evidence to the contrary, although notification must be given to HMRC within 60 days on Form 17 (ITA 2007, s.837). Conversely, if no notification is given then even if the shares are not equal, husband and wife are taxed on a 50/50 basis.

For non-spouses the declaration provides the appropriate evidence for a split of the income.

(f) Capital Gains Tax

The declaration of trust evidences the ownership of the respective interests for capital gains tax purposes.

2. THE LEGAL TITLE

2-004 It has been mentioned that the shares of joint holders of property should be defined by a declaration of trust (see above). The whole purpose of the original 1925 property legislation was to keep equitable interests off the legal title and indeed the Land Registration Act 2002, s.78 replicates the 1925 Act to provide that so far as possible, references to trusts shall be excluded from the Register.

(a) Unregistered land

The conveyance to the parties who hold the property would normally have declared that they were to hold the same "as tenants in common in equal shares" (or as the case may be), or alternatively that it was to be held by them as trustees "upon the trusts of a declaration of trust of even date to be executed immediately after this Deed". **2-005**

In practice it is often some time before a declaration is executed; the priority has been to complete the conveyance. In any event, if the division of shares is to be by reference to the total costs incurred in purchase (and not just the purchase price), the relevant figures may not be known at the time of completion.

(b) Registered land

The transfer to two or more purchasers will be in form TR1 and if the transferees execute it they will declare that they hold the property either as tenants in common or alternatively upon the terms of a declaration of trust to be executed immediately thereafter. The Registrar will automatically enter a restriction in Form A to the effect that no disposition by a sole proprietor of the land (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court. This entry is obligatory where the survivor of registered joint proprietors will not be able to give a valid receipt for capital monies (Land Registration Act 2002, s.44(1), Land Registration Rules 2003, r.95(2) and Form A, Sch.4). No fee is payable in respect of the entry of this restriction. **2-006**

3. THE CONTENTS OF THE DECLARATION

The precedents that follow in this chapter concentrate on the percentage interests of the parties. However, there is no reason why the declaration should not contain (if applicable) provisions as to the subjects set out below. **2-007**

(a) Outgoings

It should be agreed as to whether or not a party who pays outgoings such as insurance, chief rent, etc. should be reimbursed. The practical view is that the occupier of the property should pay these. **2-008**

(b) Repairs

It should be agreed as to whether or not one party has the obligation to see to repairs and either to pay the costs, or perhaps receive reimbursement as to half (or whatever agreed proportion) out of the proceeds of sale before division.

(c) Power of sale

2-009 Land held by two or more persons is held upon a trust of land (Law of Property Act 1925, s.36, and see p.4 above). As trustees of land they have the powers of an absolute owner including a power of sale (Trusts of Land and Appointment of Trustees Act 1996, s.6(1)). Under s.8 Trusts of Land and Appointment of Trustees Act it is possible for a declaration of trust to contain provisions limiting the trustees powers. If, therefore, there are to be restrictions, say, as to when a sale is to take place, these should be contained in the declaration of trust (see Precedent 9). It will be appreciated that while such an agreement may be binding between the parties to the declaration, it will not bind a mortgagee who will only have been concerned with the legal estate.

If the powers of trustees of land to deal with the property are to be limited as permitted by s.8 above for example if consents to sale or exercise of other powers are required, that limitation must be reflected by entry of a restriction in form B in the case of registered land (Land Registration Rules 2003, r.94(4) and Form B Sch.4). This restriction is in addition to the usual Form A restriction. The prescribed form B restriction simply requires a statutory declaration by the trustees or, more usually, a certificate by the trustees' conveyancer that the provisions of the trust have been complied with. Application is made on Form RX1, the fee payable being £20 for an online application or £40 otherwise (see Precedent 9A).

(d) Appointment of new trustees

Unless alternative provision is made in the declaration, on the death of one of two tenants in common the survivor will have the power to appoint a new trustee under Trustee Act 1925, s.36. The parties should consider whether they would prefer a replacement trustee to be appointed by the personal representatives of the deceased party or by the survivor with the consent of such personal representatives. If either of these courses is followed the parties should apply to register a voluntary restriction in Form Q in the case of registered land, using Form

RX1, the fee payable being £20 if submitted online or £40 otherwise (see Precedent 4A). Where (as in Precedent 6 for example) one or more of those entitled beneficially does not hold the legal title, a standard Form Q restriction would not protect him and a Form N restriction requiring the consent of the beneficiary or his personal representatives should be used to protect his interest, the fee payable being the same as for registration of a Form Q restriction.

(e) Mortgage payments

It should be considered who is to be responsible for paying these and whether or not there is to be any form of reimbursement on sale. Given the different forms of mortgages, this can present real difficulty and the majority of co-habitees, for instance, will accept that either the mortgage is to be paid equally, or that one of them is entitled to a greater percentage of the proceeds of sale (such percentage being fixed at the outset), given the fact that he or she is to be paying the mortgage (or most of it). This is probably preferable to keeping detailed accounts and records. However, the question of the mortgage must be thought about as should the entitlement to any life policy or other investment taken out in connection with it. **2-010**

Where property is purchased by several people, they may have made separate borrowing arrangements. Whilst a mortgagee will take a legal charge over the property, the owners will wish to cover this position as between themselves. It will be appreciated that an indemnity will be worthless if the party giving it has no assets or income stream to back it up.

It seems to be common practice for instance for medical practitioners to purchase premises, and obviously from time to time there are changes in the medical partnership, with a new partner often purchasing a retiring partner's share in the premises. It is usual for the same bank to finance each of the partners, taking a charge on the surgery premises to secure those borrowings. It is important, therefore, between themselves that the partners create cross-indemnities (see Precedent 7). **2-011**

Similarly, an individual may wish to borrow money to fund a business on the security of a second mortgage on a house owned jointly with a spouse or civil partner. Whilst they are both primarily liable to the mortgagee in respect of such mortgage, the spouse may wish to protect his or her interest in the home so far as is possible. He or she should certainly insist on the lender agreeing a limit to the amount of borrowing being charged on the property and should obtain an indemnity from his or her spouse or civil partner in respect of the second mortgage (see Precedent 5).

4. DEATH OF A TENANT IN COMMON

2-012 Where the death of a tenant in common occurs so that the legal title stands in the name of one person alone, it is necessary to appoint a further trustee or trustees of the legal estate so that a good receipt for capital monies is obtained by any purchaser (Law of Property Act 1925, s.27(2) as amended by Trusts of Land and Appointment of Trustees Act 1996, Sch.3, para.4(1),(8)(b)) and so that a transfer will be registered (see restriction above, p.14). Where the land is unregistered it will be necessary to execute a deed of appointment of new trustees (see Precedent 3A) which will automatically vest the property in the new trustees. However, because this transfer by operation of law now triggers compulsory registration, an application for first registration of title will need to be made on Form FR1 accompanied by the deed of appointment. Where the title is registered, the appointment can be made by a land registry transfer in Form TR1, and no separate deed of appointment is needed (see Precedent 3B). In both cases, the application will need to be accompanied by evidence of death such as a death certificate or grant of probate or letters of administration.

The original declaration of trust may specify that the power of appointment of a new trustee on the death of one of the trustees is vested in the personal representatives of that trustee or requires the consent of those personal representatives.

Subject to the provisions of the original declaration of trust the Trustee Act 1925, s.36 allows a surviving trustee to appoint a new trustee. If it is not envisaged that the property will be sold until after the death of the surviving tenant in common it might be prudent to appoint two new trustees so that they are in place at the time of the second death and the above precedents provide for this.

5. CONTINUING RESIDENCE FOR THE SURVIVOR

2-013 Where two people who are not spouses or civil partners live together, they may feel that whilst they would like their entitlements in the jointly owned property to pass to their own families eventually, they would wish the other party to have the right to remain in the property for so long as he or she wishes. This is also increasingly an issue in the case of spouses or civil partners with children from an earlier relationship. This will be best dealt with by the parties making appropriate provision in their respective wills as regards their share of the property. Creating a

trust over the property in the parties' lifetime is likely to have the disadvantage, post-22 March 2006, of bringing the property into the relevant property regime for inheritance tax and any attempt to postpone the application of the provisions of the trust until death may be ineffective.

In these situations it is often the case that the parties will take out a life policy on their joint lives, the proceeds of which will be payable to the survivor on the death of the first of them, with the intention that they will use the proceeds to pay off the mortgage. There is a risk that if the mortgage remains outstanding on the first death and the survivor chooses not to use the proceeds to discharge the mortgage, the estate of the first to die will receive a reduced percentage of the proceeds of sale. One option is to record this intention in the deed and for the parties to covenant to use the proceeds of the policy in this way with provisions in the declaration of trust adjusting the shares of the proceeds of sale in the event of default. Precedent 10 can be used for this purpose and the effect will be that any surplus proceeds of the policy over and above that needed to discharge the mortgage will be retained by the survivor. It is envisaged that the original tenants in common will be the trustees and on the death of one of them his or her personal representatives, rather than the survivor will have the power of appointing a replacement trustee.

It should be noted, however, that an arrangement of this sort will not offer full protection to the estate of the first to die if the loan to value is high and there is a danger that the net sale proceeds will be insufficient to compensate the estate for the benefit of the policy proceeds foregone. It would be advisable in this situation for the parties instead to place the life policy in trust, so that the destination of the proceeds either follows the beneficial interests in the property, or alternatively, if more flexibility is required, the policy could be held on discretionary trusts with a letter of wishes indicating that the proceeds be used to discharge the mortgage.

6. STEPS TO BE TAKEN

(a) Stamp Duty Land Tax

The declarations of trust will not in general attract SDLT as there is no consideration. An appointment of new trustees is not a land transaction for SDLT (see *HMRC SDLT Manual 31745*). Therefore no SDLT liability arises either on the deed of appointment of new trustees (Precedent 3A), or on the subsequent transfer (Precedent 3B), even if

the new trustees give consideration by taking on trust borrowing or giving the outgoing trustees an indemnity. As the declaration in Precedent 8 in effect constitutes a sale, SDLT will be payable and a land transaction return must be made within 30 days.

(b) Copies

It is obviously prudent that each tenant in common has a copy of the declaration of trust to prove his entitlement.

PRECEDENTS

Precedent 1—Property purchased by two persons as tenants in common. Straightforward agreement on division of sale proceeds in percentage shares. No mortgage. 2-015

THIS DECLARATION OF TRUST is made this day of 201

BETWEEN (1) [X] of [address] and (2) [Y] of [address]

WHEREAS:

(A) By a Conveyance/Transfer dated the property (“the Property”) details of which are contained in the Schedule was conveyed/transferred to [X] and [Y] to be held by them [unregistered land] as tenants in common or [registered land] subject to the usual joint proprietorship restriction.

(B) The parties make this Declaration to set out their respective interests in the Property and its proceeds of sale and the income from it.

NOW THIS DEED WITNESSES as follows:

1 The parties hereto DECLARE that they hold the Property on a trust of land.

2 The parties hereto DECLARE that they hold the Property and its proceeds of sale (after deducting the costs of sale) and the income from it UPON TRUST for themselves as tenants in common:

(a) as to [60%] for X absolutely

(b) as to [40%] for Y absolutely

IN WITNESS whereof this Declaration has been duly executed the day and year before written.

SCHEDULE

[unregistered land—brief description]

[registered land—Title No—Address]

substitution for [Y] shall be vested in the Wife during her lifetime and after her death in her personal representatives.

[10 Charging clause if professional trustees:

Any trustee hereof engaged in a profession or business shall be entitled to be paid all usual professional or other charges for business transacted and acts done by him or by a partner of his in connection with the trusts hereof (whether or not in the course of his profession or business) including acts which a trustee not being in a profession or business could have done personally].

IN WITNESS etc.

SCHEDULE

[see *Precedent 1*]

Attestation—[as *Precedent 1*]

Note: Application to be made to the Land Registry on form RX1 for restriction to reflect powers of appointment of trustees (see *Precedent 4A*).

4

Legal owner of home holding for another (or for self and another)

1. INTRODUCTION

It is not unusual for a sole homeowner to want to recognise the equity that someone else may have contributed. Whilst this can be solved by the owner transferring the property into joint names to be held as a joint tenants or tenants in common (in which latter case a declaration of trust should be made; see *Precedent 1*), this may not be convenient (for examples see below) and a declaration of trust, whilst not psychologically the same, can achieve the same result in equity. 4-001

Similarly, an individual may have a personal right to buy a property but be financially unable to do so. Again, if the money is provided by someone else, the provider's interest can be recognised by the individual making a declaration of trust.

2. NOMINEE CONVEYANCE

If mere anonymity is required at the time of the purchase, then the appropriate course is for an individual to complete the purchase and then immediately make a nominee conveyancer transfer to the true purchaser (see precedents in *Encyclopaedia of Forms and Precedents*, 5th edn (London: Butterworths, 2015), Vol.37, pp.530–533. Such a situation may arise where for instance an agent completes the purchase of a property bought at auction and immediately following completion transfers the property to the party for whom he acted and who put up the purchase price. 4-002

If, however, it is intended that the property should remain in the nominee's name for the time being, then the appropriate course is for 4-003

the nominee to make a declaration of trust (see Precedent 21). This can leave the real owner a little exposed should the trustee be unscrupulous, and the real owner should be advised:

- (1) in the case of unregistered land to ensure that he (the real owner) holds the title documents, to consider the appointment of a further trustee (on the grounds that one person may be unscrupulous but two are less likely to be so!) and to register a caution against first registration, so that the real owner will learn about any application to HM Land Registry and have the opportunity to oppose it (see Precedent 21A). Application for registration of a caution must be made on the prescribed form CT1 (Land Registration Rules 2003, r.42) and must sufficiently identify the land—preferably by plan. The form includes a statement of truth which sets out the interest which the cautioner claims in the land, in this, case that he is the beneficial owner under the declaration of trust. It is not necessary for the declaration to accompany the application.
- (2) in the case of registered land, in theory, because the land is held on trust, the registered proprietor as sole trustee is obliged to apply for the entry of a form A restriction preventing sale by a sole trustee (Land Registration Rules 2003, r.94(2)). The Registrar is not obliged to enter such restriction automatically and in practice may not be made aware that the proprietor holds as trustee. However, if the sole trustee fails to apply for this restriction the real owner may apply for its entry as a person who has an interest in the registered estate (Land Registration Act 2002, s.43(1)(c) and Land Registration Rules 2003, r.93(a) (see Precedent 28). In the absence of the consent of the registered proprietor the Registrar will serve notice of the application on him, giving him 15 business days to object (Land Registration Act 2002, s.45, Land Registration Rules 2003, r.92(9)). He may also apply for a restriction in Form N preventing the registration of dispositions without the real owner's consent (Land Registration Rules 2003, Sch.4, Form N) (see Precedent 29).

3. THE COUNCIL HOUSE

4-004 The Housing Act 1985 gave occupiers of houses owned by their local authority or New Town Development Corporation a right to buy the

house and this right was extended to certain tenants of registered social landlords by the Housing Act 1996. Discounts on the value of the property depending upon the length of occupation can make such a purchase an attractive proposition.

The discount is only available to the occupying tenant, who is often elderly or without means to purchase. However, someone within the family may be prepared to provide the finances necessary for the purchase and it is this contributor's position that should be protected.

This can be done by:

- (1) a declaration of trust being made by the legal owner (the council tenant); and
- (2) registering a restriction at HM Land Registry (see above). The question of unregistered land does not arise because any such purchase is subject to compulsory registration of title (Housing Act 1985, s.154).

A relevant disposal (see Housing Act 1985, s.159) of the property within five years of purchase (Housing Act 1985, s.155 as amended by Housing Act 2004, s.185) triggers repayment of the discount, the amount being calculated by reference to the number of years since purchase. It is worth noting that the vesting of the whole of the property in a person taking under a will or on intestacy, or if the disposal is pursuant to a property adjustment order in matrimonial proceedings where continuing occupation is envisaged, are exempt disposals as are certain disposals to family members and do not trigger repayment of the discount (Housing Act 1985, s.160).

(a) Contents of the declaration

It is important that the parties, that is the person with the right to buy ("the occupier") and the contributor, consider: 4-005

- (1) is there to be a provision at the end of the repayment of discount period whereby the contributor can require the property to be transferred to his name? This will probably depend upon the agreed "stake" (if any) of the occupier in the property;
- (2) should the position of the occupier be protected so that the property cannot be sold without his consent? This is important—the elderly council tenant could count on security of tenure. If her

son provides the purchase price and then has matrimonial proceedings, the estranged daughter-in-law might press for a sale of the former council house so as to unlock monies. Alternatively the son could become insolvent and his trustee in bankruptcy press for a sale;

(3) if the occupier is to have a stake in the property how are the respective interests to be dealt with during the "repayment of discount period" and thereafter?, and

(4) who is to pay the outgoings such as insurance and cost of repairs?

4-006 Of the precedents that follow, Precedent 22 recognises the contributor's stake and after repayment of that, splits the balance (say) 50/50 between the occupier and the contributor. The precedent can easily be adapted (in the Schedule) to recognise an amount that the occupier may have paid by varying the percentage due to the contributor.

Precedent 23 deals with a case where a mortgage is taken out and discharged by the former council tenant. It must be agreed how this is to affect the interests of the parties; as drafted the contributor benefits as the mortgage is reduced thus to an extent compensating him for money laid out on which he is getting no return.

Precedent 24 provides for the proceeds of sale (after repayment of any discount) to be split between the occupier's grandchild and the contributor (i.e. the occupier's grandchild gets some of the benefit of the discount at the end of the day). The precedent therefore contains additional provisions to cope with the appointment of trustees and deal with the proceeds of sale in the event that the grandchild is a minor at the relevant time – hence the additional precedent concerning an appointment of trustees (Precedent 25).

(b) Inheritance tax considerations

Where, as in Precedents 22, 23 and 24, the property is being purchased as a home for the occupier who has a right of occupation under the terms of the trust (and must consent to any exercise of the power of sale) the trust will not be a bare trust but where created on or after 22 March 2006, will fall into the relevant property regime so that there will be a lifetime chargeable transfer on its creation and the possibility of future periodic and exit charges (see Ch.1). This may not matter if the value of the property is well within the nil rate band and the donors have

not made other chargeable lifetime gifts, but where the values are more significant, consideration will need to be given to these tax implications.

4. RECOGNITION OF ANOTHER'S CONTRIBUTION

It is not uncommon for a person to join a sole proprietor of a property and subsequently spend his or her own money improving or extending it. Particularly if the parties are not married, the party who has expended money ("the contributor") may wish to acquire a formal interest in the property. **4-007**

If the property is subject to a mortgage then to place the title into the joint names of the parties will invariably require the consent of the mortgagee, and the contributor will be expected to covenant in favour of the mortgagee. Costs will be involved.

Similarly, a property may have been purchased in one name (because a spouse or partner was not available or did not want to be involved in any mortgage application) and it is necessary to recognise the contributor's share or contribution. The transfer or conveyance into joint names will incur costs and, if there is a mortgagee involved, require the mortgagee's consent and satisfaction of other conditions.

It is simpler and cheaper that the property remain in the name of the sole proprietor. The following points should also be borne in mind.

(a) Unregistered land

The proprietor should execute a declaration of trust to the effect that the property is held in specified shares for the proprietor and the contributor. Because the declaration will not affect the legal title, a caution against first registration should also be lodged (see above, p.82). **4-008**

(b) Registered land

The registered owner should execute a declaration of trust as above. A Form A restriction should be entered together with a Form B restriction if there are further limitations on the powers of the registered owner as sole trustee, for example, if such trustee cannot dispose without the consent of the contributor or his personal representatives. Precedents 26 and 27 can be adapted to either registered or unregistered land.

5. TRANSFER OF ENTIRE BENEFICIAL OWNERSHIP

4-009 In contrast to the earlier section where property stood in the name of one person who wished to recognise the contribution or entitlement of another, there are cases where the sole owner wishes the entire beneficial entitlement to be transferred to another, but is unable to transfer/convey the legal estate without difficulty or expense. A typical situation would be where a husband owns a house subject to mortgage in his sole name and wishes to put it into his wife's name. This could involve a heavy liability to stamp duty land tax.

If on a transfer of property subject to a debt (and not a transfer of property in connection with divorce under Finance Act 2003, Sch.3 para.3) the transferee covenants (either in the transfer or separately) to pay the debt or indemnify the transferor in respect thereof, such a covenant constitutes chargeable consideration and establishes the transaction as a land transaction on which SDLT is payable (see Finance Act 2003 Sch.4, para.8).

Where no express covenant is given by the transferee, HMRC takes the view that one is implied unless a contrary intention is shown. Thus, unless Finance Act 2003 Sch.3, para.3 above applies, a mortgaged property transferred from one person to another will incur a charge to stamp duty land tax unless it is clear that the transferor alone remains liable for the debt. This is unlikely if there is a transfer of the legal estate, for the mortgagee will in most cases be taking a covenant from the transferee. It is appropriate therefore that legal title and the mortgage liability remain with the transferor, the equity in effect moving across via a declaration of trust (see Precedent 30).

Of course, the donee's position should be protected in the case of registered land by the registration of a restriction (see, for example, Precedent 28).

6. STEPS TO BE TAKEN

(a) Stamp Duty Land Tax

4-010 The declarations of trust will not attract SDLT and will not require a self certificate as there is no consideration unless the property is subject to a debt and the beneficial owner covenants to discharge it.

(b) Land Registry

The entry of a Form B or Form N restriction on the register will cost £20/40, and entry of a Form A restriction is free as before. The fee for registering a caution is £40.

(c) Copies

All interested parties in the declaration of trust should have a copy.

Precedent 36—Deed of appointment of additional trustees of a Declaration of Trust. Settlor remaining as a trustee.

5-019 THIS DEED OF APPOINTMENT is made this day of
201
BETWEEN

(1) [The Settlor] of [address] (“the Appointor”) and
(2) X of [address] and Y of [address] (“the
New Trustees”)

WHEREAS:

(A) By a Declaration of Trust (“the Declaration”) dated 201
the Appointor declared that he held the policy/policies details of which
are given in the Schedule upon the trusts and subject to the powers and
provisions as set out in the Declaration.

(B) The Appointor wishes to appoint the New Trustees to be additional
Trustees of the Declaration

NOW THIS DEED WITNESSES as follows:

In exercise of the power given to him by the Trustee Act 1925 and of the
power given to him in the Declaration the Appointor HEREBY
APPOINTS the New Trustees to be trustees of the Declaration to act
jointly with himself.

IN WITNESS etc.

SCHEDULE

[take in details of the Policy/ies from the Declaration]

Attestation by all parties

6

Company shareholdings

1. INTRODUCTION

Company shares, just like so many other assets, can be the subject of a trust. As in all trusts there should be certainty as to the subject matter of the trust, otherwise it is void. Obviously if numbered shares are the subject of a trust, their identity is clear. However, the holding of a block of shares means that the shares are indistinguishable one from another. Provided that the proportion or number of shares is clear then a declaration of trust that a person is trustee for another of a proportion of the shares owned by the trustee is not void for lack of certainty (*Hunter v Moss* [1994] 1 W.L.R. 452). 6-001

For the purposes of the membership register, the company is not concerned with any trusts to which its shares may be subject (Companies Act 2006, s.126); the members shown on the register of shareholders are its members, whether or not they are trustees or nominees for another. In the case of joint shareholdings, unless the Articles of Association specify otherwise, it is the first-named holder who has the vote. (Companies Act 2006, s.286, The Companies (Tables A to F) Regulations 1985 (SI 1985/805), Table A, reg.55). If there is disagreement between joint shareholders as to how a vote should be exercised, that is not a matter which concerns the company.

However, where there is a declaration of trust relating to a very substantial block of shares in a public company both trustees and beneficiaries could potentially have disclosure obligations under the FCA’s Disclosure and Transparency Rules. These rules replaced the domestic rules relating to disclosure of interests in major shareholdings contained in the Companies Act 1985 and resulted from the implementation in the UK of the European Transparency Directive. Whilst a detailed consideration of these rules is outside the scope of this book, it should be noted that these obligations are triggered by a person’s acquisition or 6-002

disposal, not of shares, but of voting rights, and require disclosure both to the Company and to the FCA, although there are no longer criminal sanctions.

In addition under provisions yet to come into force in the Small Business, Enterprise and Employment Act 2015, all companies will be required to keep a register of people with significant control over the company (PSCs) and there will be a corresponding duty for PSCs to provide the necessary information to the company. PSCs will include those holding more than 25 per cent of shares or voting rights, those with the right to appoint or remove a majority of directors and those having the right to exercise, or who actually exercise, significant control over the company. In the case of a nominee arrangement it is the beneficial owner who is treated as holding the shares and in trustee situations where the trustees meet the conditions for a PSC, a person who has the right to exercise or who actually exercises significant control over the activities of the trust will be a PSC. Statutory guidance as to the meaning of "significant control" is yet to be published.

Separately, under Companies Act 2006, s.793, a public company can issue a notice to persons it believes to be interested in shares in the company, which can include a beneficiary under a trust, who must then disclose the nature of their interests.

Where there is a takeover bid, there are also disclosure obligations (which, with very limited exceptions, apply only to public companies) during the offer period under the Takeover Code in cases where a person has direct or indirect ownership of 1 per cent or more of the shares in the offeror or offeree company.

2. THE NOMINEE/TRUSTEE SHAREHOLDER

6-003 There are many reasons why shares may be held by the registered shareholder for someone else, whether in relation to all or part of the shareholding.

A declaration of trust relating to company shares may be appropriate in the following circumstances:

(a) Preservation of anonymity

A declaration of trust may be useful not only where a person wishes to be an anonymous shareholder but also where he has purchased shares from an existing shareholder and has difficulty (or a reluctance) in going onto the share register, (see Precedents 37 and 38). A transfer is

incomplete until registered (*Powell v London and Provincial Bank* [1893] 2 Ch.555) and pending registration the transferee only has an equitable title to the shares transferred to him. In general beneficial ownership passes when the transferor has done all in his power to effect a transfer *Re Rose, Rose v IRC* [1952] Ch.499, *Kaye v Zeital* [2010] EWCA Civ 159). However, the facts must be looked at carefully; see *Pennington v Crampton* [2002] E.W.C.A. Civ 227 where it was held that the requirement to deliver a signed transfer to the donee could be dispensed with where it was clear that the donor intended to make an immediate gift, and commentary in *Dymond's Capital Taxes*, paras 5.320-322 (Sweet and Maxwell). Where there is the likelihood of a company refusing or being reluctant to register a transfer, the execution of a declaration of trust can produce certainty of a change in beneficial ownership. (see *Re Macro (Ipswich) Limited* [1994] 2 BCLC 354). It should be noted that most shares in public companies are now held and transferred in electronic form under the CREST system.

(b) Takeover bids

Where shares in a private company are subject to a takeover bid from a public company, thus unlocking the value of the private company shares, the shareholder may wish to transfer some shares but may be reluctant to submit the transfer with his share certificate to the company registrar at a time when this might put the shares "in limbo" as far as acceptance of an offer is concerned. A declaration of trust (see Precedent 39) will serve the purpose of keeping the shares registered, whilst disposing of the benefit to the ultimate transferee. 6-004

(c) Restrictions on transfer

Where there are restrictions on transfer, the simplest means of effecting a change in beneficial ownership may be by execution of a declaration of trust. Similarly where meetings of the board at which transfers are considered are infrequent and the proposed transferor wishes to effect a disposal before a given date or get a period of time running this can be achieved by execution of such a declaration (appropriate for insolvency or inheritance tax purposes, see Ch.1).

(d) Shares in a subsidiary

Prior to 2009, because it was a requirement for public companies to have at least two members, many companies structured themselves 6-005

so as to have a subsidiary with two shareholders, with one share (or the entire number of issued shares except for one) being held by the parent company and the remaining share being held either by the parent company and an individual (normally a director) or by the individual alone. In such situations it was appropriate that in order to protect the parent company, the individual shareholder should make a declaration of trust acknowledging that he holds the share for the parent company and would act in accordance with its instructions. Ideally, he would also execute a stock transfer form to be held by the parent company.

From 1 October 2009, under Companies Act 2006, s.7 a single shareholder is able to form a public company, as has been possible in the case of private companies since the coming into force on 15 July 1992 of the Companies (Single Member Private Limited Companies) Regulations 1992 (SI 1699). It also became possible for existing subsidiaries to convert to single member companies, lessening the need to use declarations of trust in this area. However if a declaration is still considered appropriate, Precedent 38 can be adapted for use.

3. CONTENTS OF NOMINEE DECLARATION

6-006 Because the trustee is a bare trustee, the traditional view has been that he must act as instructed by the beneficiary and that he must for example vote in respect of the shares as the beneficiary directs (*Kirby v Wilkins* [1929] 2 Ch.444) (see Precedent 37). However it has recently been held in New Zealand that, in the absence of express provision, a trustee is not so obliged (*Re Kirkpatrick* [2005] NZHC 469). It is therefore prudent to put the matter beyond doubt by including voting instructions and other matters in the declaration (see Precedents 37, 38 and 39).

It is obviously sensible that a beneficiary of a declaration of trust of shares receives a stock transfer form duly executed by the legal owner (and the share certificate if the whole of the transferor's shareholding is involved) so that it can be presented for registration should the need or opportunity arise.

A mere entry in a share register of a transfer of shares where there has been no physical transfer document is not sufficient to effect such a transfer (see *International Credit and Investment Co (Overseas) v Adham* [1994] 1 BCLC 66).

4. OTHER TRUST PROVISIONS

So far in this chapter we have dealt with cases where shares are held absolutely for another. Trusts are a regular feature of tax planning, and shareholders may constitute themselves trustees of all or part of their shareholding by making of a declaration of trust. Their legal standing on the share register does not alter (see above, p.139) but the beneficial interest in such shares will do so. **6-007**

The declaration of trust will of course set out the beneficiaries and the various trust powers and provisions. For the detailed drafting of such trusts, practitioners are referred to *Practical Trust Precedents* (London: Sweet and Maxwell, 2015) and Kessler, *Drafting Trusts and Will Trusts*, 12th edn (London: Sweet and Maxwell, 2014).

A declaration of trust may be particularly appropriate in a private company with a restriction on transfers. For instance, the Articles of Association may permit transfers from a shareholder to his wife, or to himself and his spouse, but otherwise require that shares to be transferred be first offered to other members. To create a trust, the shareholder could transfer shares to himself and his wife (so that there are two trustees) and they could then make a declaration of trust in respect of them. Precedent 40 merely illustrates what can be done by way of the recitals to a declaration of trust. **6-008**

With the making of the trust, the parties will need to consider whether hold over relief or entrepreneurs relief for CGT purposes is available and if so whether to make an election (see Ch.1). It should be noted that the creation of any type of trust other than a bare trust or a trust for the disabled on or after 22 March 2006 will be a chargeable lifetime transfer for inheritance tax purposes.

5. ADDITIONAL MATTERS

(a) Stamp Duty

As a result of the changes in Finance Act 2008, a declaration of trust relating to shares is no longer stampable with fixed duty of £5. However, if it constitutes a sale, ad valorem stamp duty will be payable at 0.5 per cent if the consideration exceeds £1,000. A similar liability arises to stamp duty reserve tax if the shares are transferred electronically but with no de minimis exemption. **6-009**

(b) Registration with HMRC

The declaration of trust should be reported to HMRC on Form 41G (Trust) where precedent 40 is used to create a substantive trust.

(c) Income Tax

If a married couple or civil partners own property jointly, income will be treated as arising to them equally unless an election is made (see Ch.1) for example to reflect unequal ownership under a declaration of trust. However, income distributions from jointly owned shares in a close company held by a husband and wife will be automatically taxed according to actual ownership.

Precedent 37—Shareholding held as nominee for another—nominee to vote at request of beneficial owner.

THIS DECLARATION OF TRUST is made the day 6-010
of 201 by [name and address of Trustee Shareholder]
("the Trustee")

WHEREAS the Trustee is the legal owner of [100] £1.00 Ordinary Shares in XYZ Limited ("the Shares").

NOW IT IS HEREBY DECLARED as follows:

1 The Trustee declares that he hold the Shares UPON TRUST for [beneficial owner] absolutely

2 The Trustee will at the request of [beneficial owner] attend all meetings of shareholders or otherwise of XYZ to which he shall be entitled to attend by virtue of being the registered holder of the Shares and will vote at every such meeting in such manner as [beneficial owner] shall direct and will if so required by [beneficial owner] execute all proxies or other documents which shall be necessary or proper to enable [beneficial owner] to vote at any such meeting in the place of the Trustee

3 The Trustee authorises [beneficial owner] to use the Stock Transfer Form attached to this Declaration (already signed by the Trustee) as [beneficial owner] shall think fit and will execute such other document as may be necessary to effect the transfer of the Shares in such a manner as [beneficial owner] shall direct.

IN WITNESS whereof this Declaration has been duly executed the day and year before written.

SIGNED and DELIVERED as a
DEED by the Trustee
in the presence of:

Precedent 38—Shareholding held as nominee for another, nominee to vote until instructed to the contrary, indemnity to nominee

6-011 THIS DECLARATION OF TRUST is made this day
of 201

BETWEEN:

(1) [*name and address of registered holder*] (“the Nominee”)

and

(2) [*name and address of the underlying owner*] (“the Beneficial Owner”)

NOW THIS DEED WITNESSES as follows:

1 Definitions

In this Deed the following words and expressions have the following meanings:

the “Company”
the “Shares”

ABC Limited
100 fully paid ordinary shares of 50p each in the capital of the Company being part of the total holding of shares registered in the name of the Nominee together with any further shares stock or other securities in the Company or in any other company which are derived from or issued in respect of such shares or which are distributed by the Company in respect of such shares or to which the Nominee, either alone or jointly with the Beneficial Owner, may hereafter become legally entitled by reason or as a result of the holding of such shares, including shares stock and other securities representing the same by reason of amalgamation reconstruction or re-organisation.

2 Declaration of Trust.

The Nominee agrees and declares that he holds the Shares and all dividends interest bonuses bonus and rights issue shares and other distributions and benefits in respect thereof on trust for the Beneficial Owner.

3 Dividends

The Nominee will promptly and fully account to the Beneficial Owner (or as he may direct) for all dividends distributions bonuses interest

property and/or other benefits accrued or accruing upon the Shares at any time whilst they are registered in his name and the Beneficial Owner shall receive and subject thereto give a good discharge for all such dividends and other benefits.

4 Voting

The Beneficial Owner agrees that until he shall give notice in writing to the Nominee to the contrary the Nominee shall be entitled to exercise all voting rights in respect of the Shares as the Nominee shall in his sole discretion decide without incurring liability in any respect to the Beneficial Owner.

5 Indemnity

The Beneficial Owner will at all times indemnify and keep indemnified the Nominee and his personal representatives estate and effects against all liabilities which the Nominee may incur by reason of being the registered owner of the Shares and in particular will punctually make payment to the Nominee of any monies required in the exercise of any matters rights or benefits relating to the Shares which the Nominee or his personal representatives may be or become liable to pay together with all costs and expenses incurred by the Nominee in the execution of the trusts of this deed and any related instrument of transfer.

6 Transfer

The Nominee will if and when requested by the Beneficial Owner certify that such instrument of transfer as is referred to above does not constitute a change in the beneficial ownership of the Shares subject to reasonable evidence being produced to him that the transfer is completed in favour of the Beneficial Owner or other nominee for the Beneficial Owner.

7 Costs

The Beneficial Owner hereby agrees to pay the cost of the preparation of this Declaration.

IN WITNESS whereof the parties hereto have duly executed this Declaration the day and year before written

SIGNED and DELIVERED as a
DEED by the Nominee in the
presence of:

SIGNED and DELIVERED as a
DEED by the Beneficial Owner
in the presence of:

**Precedent 39—Shareholding being the subject of an immediate gift.
Private company in course of takeover.**

6-012 THIS DECLARATION OF TRUST is made the _____ day of
201____
by [name and address of registered holder] (“Mr Smith”)

WHEREAS:

[Mr Smith] wishes to give the property specified in the Schedule to his daughter [Elizabeth Smith] (“Elizabeth”)

NOW IT IS HEREBY DECLARED as follows:

1 With immediate effect [Mr Smith] DECLARES that he holds the property specified in the Schedule (“the Shares”) for [Elizabeth] for her own absolute use and benefit.

2 [Mr Smith] will at the request of [Elizabeth] execute any Transfer or other documents as may be necessary to place the Shares in her name or as she shall direct and whilst the Shares remain registered in his own name he will vote at any shareholders meetings (in respect of the Shares) in such manner as [Elizabeth] shall direct and will if so required by [Elizabeth] execute all proxies or other documents which may or shall be necessary or proper to enable [Elizabeth] or her nominee to vote at any such meeting in the place of Mr Smith.

3 [Elizabeth] has executed this document to confirm her acceptance of the gift of the Shares.

IN WITNESS whereof [Mr Smith] and [Elizabeth] have duly executed this Declaration the day and year before written.

THE SCHEDULE

1,000 fully paid Ordinary Shares of £1.00 each in Smith (Holdings) Limited which shall include any Company succeeding to the same whether by amalgamation reconstruction takeover or re-arrangement and any Shares representing the same whether by a different capital holding in the said Company or in any other Company.

SIGNED and DELIVERED as a
DEED by [Mr Smith] in the
presence of:

SIGNED and DELIVERED as a
DEED by [Elizabeth] in the
presence of: